UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF ILLINOIS

In Re	)	
	)	In Bankruptcy
EDWARD V. RUST	)	
JUDITH M. RUST	)	No. 93-30595
	)	
Debtors.	)	
	)	
	)	
DONALD M. SAMSON, Trustee,	)	
ROSE MEISTER	)	
EDNA MAE SEMON	)	
EDWARD RUST, JR.	)	
MICHELLE T. MURRAY	)	
SUSAN E. RUST,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adversary No. 94-3026
	)	
SKY SCIENTIFIC, INC.,	)	
	)	
Defendant.	)	

O P I N I O N

Before the Court is the Motion to Dismiss filed by Defendant Sky Scientific, Inc. ("Sky") with respect to Plaintiffs' Complaint.

On December 31, 1992, Sky entered into an Agreement for the Purchase, Sale, and Exchange of Stock with Edward V. Rust, who was authorized to act on behalf of all of the holders of all of the issued and outstanding shares of capital stock in The Rust Company, Inc. (RCI), an Illinois corporation. The Agreement stated that Sky wished to purchase and RCI wished to sell 279.5 shares of RCI, which constituted all outstanding shares of RCI. In exchange, Sky agreed to transfer to Plaintiffs 500,000 shares of Class B convertible preferred stock in Sky, having a face value of $5,000,000.00, plus additional consideration of $200,000.00 cash payable in four tri-weekly installments.

At or about the same time, an Employment Agreement was entered into between Edward Rust and Sky. The Agreement was for an initial five-year period and provided for compensation payable to Mr. Rust at a rate of $125,000.00 per year. Mr. Rust was to perform all duties requested by Sky, "including, without limitation, such duties as are generally associated with the position of President of Employer. The Employee shall devote his full time to the business of the Employer with the expressed responsibility of operating a wholly owned subsidiary of Employer." Employment Agreement at p. 2.

On February 6, 1993, Plaintiffs and Sky entered into a Rescission Agreement rescinding the Sales Agreement entered into on December 31, 1992. The Rescission Agreement said nothing about the Employment Agreement.

On May 27, 1993, Edward V. Rust and Judith M. Rust filed their voluntary bankruptcy petition herein. Plaintiffs (being the Chapter 7 Trustee administering the bankruptcy estate plus the other owners of RCI stock) filed their four-count adversary Complaint on April 14, 1994. Sky filed a Motion to Dismiss (which the Court previously ordered would be treated as a Motion for Summary Judgment) with respect to each of the four counts of the Complaint. Said Motion is presently before the Court.

Count I of the Complaint states that, in exchange for allowing Sky to rescind the Purchase Agreement, Sky agreed to transfer to Plaintiffs 100,000 shares of Class B preferred stock plus an option to purchase an additional 200,000 shares of Sky stock for a price of one-half the market value of said shares. Count I further alleges that Sky has failed and refused to pay Plaintiffs the agreed consideration. In its Motion to Dismiss, Sky argues that the written Rescission Agreement is the entire agreement of the parties, that the Rescission Agreement

says nothing about a transfer of stock or a purchase option as consideration, and that any testimony to that effect would violate the parol evidence rule precluding oral modification of an unambiguous written contract. Therefore, Sky claims to be entitled to a judgment on Count I as a matter of law.

Count II alleges the same facts as Count I, but asserts that the attempt to rescind the Purchase Agreement was made without consideration, and therefore the Rescission Agreement is void. With respect to Sky's Motion to Dismiss as to Count II, Sky similarly invokes the parol evidence rule to support its position that it is not in breach of any term of the Rescission Agreement, and therefore, the Rescission Agreement is enforceable as a matter of law.

Count III alleges that the Rescission Agreement was entered into within one year prior to the filing of the petition in bankruptcy, at a time when the Debtors were insolvent (or that the Rescission Agreement rendered the Debtors insolvent), in violation of § 548 of the Bankruptcy Code. Accordingly, Plaintiffs argue, the Rescission Agreement constitutes a fraudulent transfer which should be set aside. As to Count III, Sky asserts in its Motion that it was never a debtor of RCI and never had ownership of any RCI stock. Therefore, Sky argues, there was never a "transfer" as defined by § 548 of the Bankruptcy Code, and § 548 is inapplicable as a matter of law.

Count IV is brought pursuant to the Employment Agreement between Sky and Mr. Rust. Count IV alleges that the Employment Agreement was never rescinded, that Mr. Rust has performed under the Agreement, but he has never been paid pursuant to the terms of the Agreement. As to Count IV, Sky argues that a cause of action to enforce an employment contract

exists only between an employer and employee. Therefore, a trustee in bankruptcy is an improper party to bring such a cause of action. In any event, Sky argues, there were no damages because Mr. Rust was never on Sky's payroll, Mr. Rust performed no services for Sky, and Mr. Rust's job duties were contemplated to be limited to running RCI as a wholly-owned subsidiary of Sky. Because RCI never became a wholly-owned subsidiary of Sky, Mr. Rust's services were never performed, utilized, or needed.

In order to prevail on a motion for summary judgment, the movant must meet the criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) states in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c); see also Donald v. Polk County, 836 F.2d 376, 378-379 (7th Cir. 1988). All reasonable inferences to be drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Karazanos v. Navistar International Transportation Corp., 948 F.2d 332, 335 (7th Cir. 1991).

With respect to Count I, Plaintiffs concede that the parol evidence rule excludes evidence of a prior or contemporaneous oral agreement which varies or contradicts the terms of a written contract. However, Plaintiffs argue, there are exceptions to the applicability of the parol evidence rule. In fact, Sky concedes that, in an appropriate case, fraud in obtaining the written agreement will be grounds for the court to allow evidence of prior or contemporaneous oral agreements. The Court accepts the fact that there are exceptions to the parol evidence

rule, and notes that Plaintiffs argue that there may have been fraud in the inducement. Clearly, the applicability of one or more of these exceptions to the parol evidence rule is a question of fact in this case; therefore, summary judgment is inappropriate as to Count I.

With respect to Count II, the Court concludes that the question of whether the Purchase Agreement was an executory contract at the time of the filing of the bankruptcy petition is a question of fact. Whether the contract was executory at the pertinent time must be determined by examining the circumstances which existed at that time; it was not executory as a matter of law. Moreover, Plaintiffs admit that they must show that there has been a substantial breach by Sky of the Rescission Agreement in order for Plaintiffs to prevail. Plaintiffs intend to argue that Sky's failure to transfer stock to them in exchange for executing the Rescission Agreement constitutes a substantial breach of the Rescission Agreement. Obviously, the questions of fact regarding parol evidence raised in Count I will need to be resolved in order to decide Count II as well. For these reasons, the Court finds summary judgment inappropriate for Count II of the Complaint.

With respect to Count III, the Rescission Agreement may have constituted a fraudulent transfer in violation of Section 548 of the Bankruptcy Code if it was done for "less than reasonably equivalent value." 11 U.S.C. § 548(a)(2)(A) Specifically, if the Court determines that the Debtors' rights under the Purchase Agreement constituted a valuable property right, then it seems clear that the next question must be whether the Debtors obtained reasonably equivalent value in exchange for executing the Rescission Agreement. If they did not, then there may have been a violation of Section 548. Obviously this is a question of fact which must be determined in order to resolve Count III; therefore,

summary judgment is inappropriate as to that Count as well.

Finally, as to Count IV, there appear to be numerous factual issues which must be determined. First, was the Employment Agreement rescinded by the Rescission Agreement, even though the Rescission Agreement makes no mention of the Employment Agreement? To the extent the invocation of the parol evidence rule helps Sky's case in Counts I and II, it appears to undermine it as to Count IV. Second, was the Employment Agreement executory in nature at the time of the filing of the bankruptcy petition? Rust argues that it had already been breached by Sky at that time, and therefore is no longer executory and no longer subject to assumption or rejection. Sky disputes this fact, and apparently intends to show that Mr. Rust's services were never needed since RCI was never acquired by Sky. Third, if the Employment Agreement was executory at the pertinent time, could the Trustee have assumed or rejected it? Rust cites authority for the proposition that the Chapter 7 Trustee does not have the power to assume or reject a personal services contract because personal service contracts are not part of the estate. While that question may be a question of law, the Court views the others as legitimate questions of fact, thereby rendering summary judgment inappropriate for Count IV.

For the reasons set forth above, Sky's Motion for Summary Judgment is denied.

This Opinion is to serve as Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

See written Order.

ENTERED: December 14, 1994

/s/ LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE